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God Save This Honorable Court:
Religion as a Source of Judicial Policy Preferences

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God Save This Honorable Court:
Religion as a Source of Judicial Policy Preferences

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God Save This Honorable Court:

Religion as a Source of Judicial Policy Preferences

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If Supreme Court behavior is structured largely by the policy preferences of the justices, political scientists ought to consider the source of those preferences. Religion is one force that can strongly shape a judge's worldview and therefore her votes. In this paper, I examine the effect of religion on U.S. Supreme Court votes in 11 issue areas plausibly connected to religious values. Catholic justices vote in ways that more closely adhere to the teachings of the Catholic Church than non-Catholic justices even after controlling for ideology. These results may indicate that Catholic theology is different from Protestant or Jewish theology. It is also possible that on some issues there is not much of a theological difference, but religious values play a more prominent role in public life for Catholic justices.

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Chapter One: Introduction

The religious composition of the U.S. Supreme Court has undergone a remarkable transformation. Whereas in decades past, presidents consciously limited Catholic participation on the Court to one seat (Noonan 1981; Perry 2008), the current Court has six Catholic members. With Justice Stevens' retirement and replacement by Elena Kagan, the current Court has no Protestant members for the first time in its history. This change in religious makeup has prompted journalists who cover the Court to speculate whether religion influences a justice's decisionmaking (Biskupic 2009; Liptak 2010; Lithwick 2009). This question should also be of interest to political scientists, but with a couple of exceptions (Pinello 2003; Songer and Tabrizi 1999) most of the recent literature in judicial politics has overlooked religion as a potential explanatory variable.

If the attitudinal model (Segal and Spaeth 1993) is correct – that behavior on the Supreme Court is shaped largely by the justices' policy preferences – it would behoove political scientists to examine where a justice's preferences originate. It is plausible that a judge's religion would shape her political worldview and consequently her decisions, especially if judges are sometimes unconstrained by legal doctrine. In other fields of political science, religion has been shown to play a role in shaping the worldview and behavior of legislators (Daynes and Tatalovich 1984; Tatalovitch and Schier 1993) and voters (Green, Rozell, and Wilcox 2006; Jelen and Wilcox 2003). Similarly, judicial politics scholars have considered the role of gender and race as drivers of policy preferences (Boyd, Epstein, and Martin 2010; Farhang and Wawro 2004). This paper

hopes to revive an old tradition in judicial politics research (*e.g.*, Goldman 1975; Nagel 1969; Ulmer 1973) by taking a fresh look at the effect of religion on judging.

The notion of basing judicial decisions on religious values is one that several justices have rejected publicly. Concerning prayer in schools, Justice Brennan stated: “I had an obligation under the Constitution which could not be influenced by any of my religious principles” (as cited in Biskupic 2009, 188). On the issue of abortion, Justice Scalia said, “I have religious views on the subject. But they have nothing whatsoever to do with my job” (as cited in Biskupic 2009, 191). Both of these justices may be right in the sense that they never consciously base their judicial behavior on their religious values, but it would be impossible for a judge to suppress her values completely. Courts make rulings on vital moral and social issues, including whether police conduct “shocks the conscience” (*Rochin v. California* 1952). It would be very difficult in these sorts of cases for a judge to check his conscience at the courthouse door.

This paper analyzes voting behavior on the U.S. Supreme Court in non-unanimous cases between the 1953 and 2007 terms. This broad timeframe allows for a rich comparison of very different Catholic justices, including the liberal William Brennan and the conservative Antonin Scalia. The cases analyzed are selected from 11 different legal issues that could be connected to religious values. Whether using logistic regression analysis or semiparametric matching (Ho et al. 2006), the results in many of these issue areas suggest that Catholic justices vote in ways that more closely adhere to the teachings of the Catholic Church than non-Catholic justices. On issues like poverty law, Catholic values would predict a vote in the liberal direction and on other issues, such as abortion,

Catholic values would predict a conservative vote. These results persist even when taking into account differences in ideology. There is also some limited evidence that Catholic justices are more likely to write separate opinions in these issue areas than non-Catholic justices.

These findings could be interpreted in one of two ways – or perhaps a combination of both. First, Catholic justices might behave differently than non-Catholic justices because of theological differences between Catholics, Protestants, and Jews. Admittedly, this is difficult to surmise with high accuracy. The best way to account for theological differences would be to observe the justices during their religious activities, especially the non-Catholic justices. Most Protestant and Jewish denominations reject religious hierarchies, which leaves individual ministers and rabbis freer to interpret scripture as they wish. Priests in Catholic Church, on the other hand, are somewhat more constrained in their ability to interpret scripture by the positions taken by the Vatican and other church authorities. The Magisterium, or the teaching authority of the Church, is premised on notion that Catholic teachings are consistent and constant across time and geography.¹ This does not mean there is no diversity of social views within the American Catholic Church. Catholic laypeople, for instance, have formed advocacy groups in Washington on both sides of the abortion debate. This paper simply argues that, compared to Protestants and Jewish denominations, there is more catholicism in Catholicism.

Thus, while it would be fairly easy to say that the “Catholic position” on abortion is pro-life, it would be difficult to identify the “Jewish position” on abortion, as that

¹ The Magisterium applies to matters of private morals, not politics. However, given the social and moral implications of many Supreme Court cases, one might expect church teachings to play a role.

depends largely on the conscience of each rabbi. As Levinson (1989, 25) notes: “[T]he rabbinic tradition contains within itself the potential for remarkable variety in interpretations.” Many Jewish and Protestant congregations belong to regional or national denominational associations that hold meetings and make statements concerning major theological issues. However, since these organizations cannot remove clergy who do not follow their dictates (like the Catholic Church) these theological declarations should not be considered binding in the same way as the Catholic Church. Indeed, the hallmark of American Protestantism over the last half century has been a shift from interdenominational conflict (*e.g.*, Baptists disagreeing with Catholics) to intradenominational conflict (*e.g.*, liberal Episcopalians disagreeing with conservative Episcopalians) (Wuthnow 1989). Such a shift demonstrates the level of difficulty of predicting judicial behavior without knowing details about the individual church a Protestant justice attends.

Second, it is possible that on some issues there is not much of a difference in theology that the justices encounter at their various houses of worship. Nonetheless, Catholic justices might behave differently than non-Catholic justices because of different attitudes regarding the role of faith in public life. In other words, Catholic justices may, consciously or subconsciously, feel more compelled to reflect their religious values in their judicial behavior than non-Catholic justices. This possibility posed a major obstacle on the campaign trail for then-Senator John F. Kennedy, who gave a speech to Protestant ministers promising “no Catholic prelate would tell the President (should he be a Catholic) how to act” (Kennedy 1998, 140). Three years earlier, William J. Brennan, also

a Catholic, encountered a similar problem during his confirmation hearings (Clark 1995, 109-11).

While these incidents are rooted in the lingering anti-Catholic bigotry that plagued America for centuries, Catholic leaders have stated that Catholic public officials have an obligation to act in accordance to their religious values. During the 2004 presidential campaign, several Catholic bishops declared that Sen. John F. Kerry and other pro-choice Catholic politicians should be denied communion because of their position on abortion (Dionne 2008). During the pontificate of John Paul II, then-Cardinal Joseph Ratzinger (2002) issued a proclamation upon which the bishops made this decision regarding Kerry, a precedent which he has continued as pope (Benedict XVI 2007). The U.S. Conference of Catholic Bishops (2007, 11) has also published a document urging ordinary Catholics to vote according to their religious values.² The voter guide states: “A Catholic cannot vote for a candidate who takes a position in favor of an intrinsic evil, such as abortion or racism, if the voter’s intent is to support that position.” The former dean of the Notre Dame Law School, Thomas Shaffer, has argued that Justice Brennan’s pledge to uphold the Constitution even if it came into conflict with his religious values amounts to a form of idolatry (as cited in Levinson 2003, 215). Shaffer’s position is rooted in a key Vatican II Catholic pronouncement (Paul VI 1965b, Article 24).

² Many evangelical Protestant religious leaders have called for a greater role for faith in public life, but with the possible exception of Justice Hugo Black (a Southern Baptist), all of the Protestant justices in this study belong to mainline denominations.

In the Protestant tradition the doctrine of universal priesthood holds that all Christians have the potential to interpret Scripture, not just priests (Levinson 1989, 16).³ Thus, Protestant lay people may be freer to come to their own theological conclusions, even if it means disagreeing with the position taken by their religious leader. If theology is more negotiable, this might mean that Protestant public officials feel less of an obligation to make their public acts dependent on their religious values. In addition, no pro-choice Protestant politician has been denied communion publicly. On the other hand, most Protestants seek out a church to attend based on congruence between their worldview and the worldview of their minister (Pew Forum on Religion and Public Life 2009). Thus, it is also possible that Protestant public officials might feel pressure to reflect their faith in public acts. Compared to Catholics public officials, it is more difficult to theorize on this issue with Protestants and Jewish public officials.

³ Like the Catholic Church, rabbis, rather than the Jewish laity, retain interpretive authority on scripture (Levinson 1989).

Chapter Two: A Brief History of Religion and Judging

Since the dawn of the Warren Court, 20 Protestants, seven Catholics, and six Jews have served on the United States Supreme Court. The religious affiliations of these justices, gathered from biographical sources, are listed in Table 1. Focusing on a justice's religion is often considered off-limits for legal historians.⁴ In recent years, however, more biographers are taking note of the influence of religion on Supreme Court justices. Colluci's (2009, 31) biography of Justice Kennedy concluded that Kennedy's emphasis on liberty is rooted in Catholic teachings, particularly the Vatican II declaration *Dignitaus Humanae* (Paul VI 1965a), which upheld religious freedom based on universal human dignity. In his autobiography, Justice Thomas acknowledged he has been influenced by natural law theory (C. Thomas 2008, 221), which he was exposed to while he attended a Catholic seminary (A. P. Thomas 2002, 97-98). Kannar (1989, 1314) has linked Scalia's textualist legal philosophy to his Catholic faith: "The experience of growing up Catholic in pre-Vatican II American was that of inhabiting a world of quaint legalisms, similar to that of created by a quaint originalist Constitution." In his historical review of the first five Catholic justices,⁵ Noonan (1981, 383) found some, albeit limited, evidence of religion influencing jurisprudence, including a memo from Justice Frank Murphy describing his opinion upholding religious freedom in *Prince v. Massachusetts* (1944) as sounding "a little Catholic."

⁴ For example, Fasset's (1994, 643) only mention of religion in his biography of Justice Stanley Reed was that the jurist's funeral was held at a Methodist Church.

⁵ These jurists are: Chief Justice Roger Taney, and Justices Edward White, Joseph McKenna, Pierce Butler, and Frank Murphy.

Political scientists began considering the effect of religion on judicial behavior much earlier than did legal historians. Nagel's (1962a, 1969) studies of state supreme courts and the U.S. Supreme Court found Catholic judges significantly more liberal than their Protestant counterparts on civil rights cases, criminal cases, and administrative agency cases. Vines (1964) presented evidence that Catholic federal district court judges were more liberal on desegregation cases than non-Catholics, but Giles and Walker (1975) did not find a significant relationship in their similar study. Ulmer (1970) found Catholic U.S. Supreme Court justices were more likely to dissent at a higher rate, and a subsequent study (1973) indicated Catholic justices were more liberal than Protestant justice in criminal cases. Goldman (1975) observed that Catholic judges on the federal courts of appeals are more liberal than Protestant judges on economic cases and cases involving administrative agencies.

In more recent studies, the evidence of a religious effect on judging is more mixed. Tate (1981) and Tate and Handberg (1991) studied U.S. Supreme Court on civil liberties and economics cases spanning over half a century, and their analyses did not produce a significant effect for religion. These results are similar to those at the district court level found by Ashenfelter, Eisenberg, and Schwab (1995). Sisk, Heise, and Morriss (2004) analyzed federal district and appellate court decisions on religious freedom and did not find different results for Catholic judges, but they did find religious effects for Jewish judges and judges from non-mainstream Christian denominations. Finally, Brudney, Schiavoni, and Merritt (1999) discovered no significant differences between Catholic and non-Catholic federal appellate court judges on union cases.

On the other hand, Songer and Tabrizi's (1999) analysis of state supreme courts found evangelical Protestant judges and Catholic judges are significantly more conservative on death penalty and obscenity cases. The results concerning Catholic judges and the death penalty are somewhat surprising, considering the Catholic Church is opposed to capital punishment (U.S. Conference of Catholic Bishops 1974). Pinello (2003) found Catholic state and federal judges were significantly more likely to rule against gay and lesbian persons. Finally, Stone's (2009) conclusion that Catholic Supreme Court justices were more conservative on abortion than non-Catholics earned him much publicized scorn from Justice Scalia (Liptak 2010).

Stone's analysis, like all the other studies cited herein suffer from one key drawback: they all lack a sophisticated measure of each judge's ideology. It is entirely possible that the religious effects measured in past studies might be due to the fact that Catholic judges are simply more liberal (or conservative, depending on the issue) than their non-Catholic counterparts. The data presented in this paper will not suffer from this methodological deficiency. Many of the studies cited above also do not adequately draw a connection between religious values and judicial policy preferences. Careful theorizing is needed to connect these two concepts. Religion is not a universal influence – it should only influence judging on those legal issues that are closely tied to it.

Chapter Three: A Theory on Religion and Judging

The hierarchical structure of the Roman Catholic Church and its requirement that Catholic public officials to be faithful to their religious values form the foundation of a theory of religion and judging. The theory posits that Catholic justices vote differently than their Protestant and Jewish compatriots on issues connected to religious values, even when underlying differences in judicial ideology are taken into account. If Catholicism exerts an influence on judging, this difference in voting behavior should be in line with Catholic teachings, which would predict a liberal vote on some types of cases and a conservative vote on others. First, the theory must sketch out the nexus between the Catholic theology and issues in American law. Because of the non-hierarchical structure of most Protestant and Jewish denominations, it is very difficult to construct a unified Protestant or Jewish position on a question of law in the same way. Figure 1 outlines the causal structure between religion, ideology, and judicial decisionmaking. My theory predicts that religion also exercises an indirect and direct effect on behavior, although this paper can only test the direct effect.

Hypotheses

Although Stone (2009) did not employ a rigorous statistical methodology, he did find some evidence that Catholic Supreme Court justices are more likely to vote in the conservative direction in abortion cases. The U.S. Conference of Catholic Bishops (2007) has instructed Catholics not to vote for politicians who support abortion rights, but the Church's pro-life stance dates back much earlier. The *Didache*, a first century

Christian treatise, contains a prohibition on abortion (as cited in Milavec 2003, 139). More recently, Pope John Paul II (1995) also strongly condemned abortion as a sin equivalent to murder. The Pew Forum on Religion and Public Life (2008) found American Catholics are substantially more conservative in their attitudes towards abortion than mainline Protestants.

Hypothesis 1: Catholic justices, *ceteris paribus*, will be more conservative than other justices in their voting on abortion cases.

Some prior studies found evidence to support the hypothesis that Catholic judges are more liberal in civil rights cases (Giles and Walker 1975; Nagel 1962a; Vines 1964), while others did not (Ashenfelter, Eisenberg, and Schwab 1995; Tate 1981; Tate and Handberg 1991). There is good reason to retest this hypothesis, as the Second Vatican Council in 1965 took a strong stance against racial and gender discrimination (Paul VI 1965b, Articles 29, 60). On the other hand, many Protestant ministers, especially within the Baptist faith, were much more resistant to desegregation (Newman 2001). On the issue of gender discrimination, Harville and Rienzi (2000) found Protestant Americans are significantly more conservative than Catholics in their attitudes towards women's right to work. These findings are particular strong amongst Protestants who more frequently attend religious services.

Hypothesis 2: Catholic justices, *ceteris paribus*, will be more liberal than other justices in their voting on racial discrimination cases.

Hypothesis 3: Catholic justices, *ceteris paribus*, will be more liberal than other justices in their voting on gender discrimination cases.

Nagel (1962a, 1962b) and Ulmer (1973) presented evidence that Catholic justices are more liberal in criminal cases than other judges, while Myers (1988) and Gibson (1977) found that fundamentalist Protestant trial court judges hand down more punitive sentences than non-fundamentalist judges. The Catholic Church's emphasis on human dignity (John Paul II 1995; Paul VI 1965a) means that all life is worth protecting, which should include, by extension, accused criminals. In the Vatican II document *Gaudium et Spes* (Paul VI 1965b) the Church places significant emphasis on upholding human rights, which one can assume includes the rights of the accused. The U.S. Conference of Catholic Bishops (1974) issued a statement opposing capital punishment, arguing that the government's approach to punishment should "manifest intelligence and compassion rather than power and vengeance." Grasmick et al. (1993) found that American Catholics are slightly more liberal in their attitudes towards capital punishment than liberal and moderate Protestants and substantially more liberal than evangelical or fundamentalist Protestants.

Hypothesis 4: Catholic justices, *ceteris paribus*, will be more liberal than other justices in their voting on criminal cases, including capital punishment cases.

Hypothesis 5: Catholic justices, *ceteris paribus*, will be more liberal than other justices in their voting on death penalty cases.

Catholic schools have played a major role in the educational landscape of the United States for over a century, and the controversy over public support of these schools is almost as lengthy. Unsurprisingly, the U.S. Conference of Catholic Bishops (2006) supports governmental support of parochial schools. More generally, if Catholic judges

have a religious obligation to reflect their values in their legal decisions (Benedict XVI 2007; Ratzinger 2002), we might expect Catholic justices to be more sympathetic to governmental efforts to accommodate religion in the Public Square. This logic would predict conservative votes in Establishment Clause cases and liberal votes in Free Exercise cases as well. This is a particularly provocative hypothesis in light of the strict separationist attitude employed by Justice Brennan, who, as mentioned earlier, was appointed to the bench during an era in which Catholic leaders had to be publically committed to religious neutrality (Perry 170-71).

Hypothesis 6: Catholic justices, *ceteris paribus*, should be more conservative than other justices in their voting on Establishment Clause cases.

Hypothesis 7: Catholic justices, *ceteris paribus*, should be more liberal than other justices in their voting on Free Exercise cases.

The U.S. Conference of Catholic Bishops (2007) has played a major role in the recent effort to provide a path to citizenship to undocumented immigrants. The Church's support of the rights of immigrants goes back to a key Vatican II declaration (Paul VI 1965b, Article 66), which held that immigrants should "be treated with equity and balance" and have opportunities to find work. Knoll (2008) presented evidence that American Catholics are more liberal on immigration issues than the rest of the population. Many recent immigrants into the United States come from Latin America, a region in which the Catholic Church has a religious stronghold. Thus, judicial rulings on immigrants' rights will affect the rights of many Catholics living in this country.

Hypothesis 8: Catholic justices, *ceteris paribus*, should be more liberal than other justices in their voting on immigration cases.

The U.S. Conference of Catholic Bishops (1993) declared their concern about the rapid spread of access to pornography. Although obscenity cases include a wide range of concepts, pornography cases play a central role in the development of this doctrine. Songer and Tabrizi (1999) presented evidence that Catholic and evangelical Protestant judges on state supreme courts were more conservative than other judges in their voting on obscenity cases.

Hypothesis 9: Catholic justices, *ceteris paribus*, should be more conservative than other justices in their voting on obscenity cases.

Goldman (1975) found that Catholic judges are more liberal on economic rights cases, whereas Tate (1981) and Tate and Handberg (1991) did not find a relationship. In a study of votes in union cases, Brudney, Schiavoni, and Merritt (1999) did not find a religion effect either. In the Vatican II document *Gaudium et Spes*, the Catholic Church (Paul VI 1965b, Article 29) stated: “For excessive economic and social differences between the members of the one human family or population groups cause scandal, and militate against social justice.” Later in the declaration (Article 67), the Church expressed its view that government should enforce a right to work and that workplace safety and adequate wages are key goals. Williamson (1974) found that American Catholics are more likely to support greater efforts to aid the poor compared to Protestants. Allinsmith and Allinsmith (1948) argued that because American Catholics often tended to be urban manual workers they had the highest levels of support for guaranteed economic security amongst any religious group. Of course, these demographics may have changed over the last half century or so. Martin Marty has

argued that the GI Bill helped elevate many American Catholics to the ranks of the middle class (Perry 164).

Hypothesis 10: Catholic justices, *ceteris paribus*, should be more liberal than other justices in their voting on poverty law cases.

Hypothesis 11: Catholic justices, *ceteris paribus*, should be more liberal than other justices in their voting on unions cases.

Religion should not be a universal influence for judicial behavior. I expect a null finding for religion on cases in issue areas where the link between religious values and law is unclear. In these cases, judicial ideology should be the only significant independent variable. Accordingly, I have selected federalism cases.

Hypothesis 12: Catholic justices, *ceteris paribus*, will not differ significantly from other justices in their voting on federalism cases.

Collins (2008) argued that the decision for a justice to write a concurring or dissenting opinion is an indication that the case in question is one of high salience to the justice. Cases in issue areas closely connected to religion should be of greater salience to the justices because these cases speak to the justice's fundamental values. The question is whether some justices are more motivated by their religion to write separately than others. Given the emphasis the Vatican has placed on Catholic public officials to incorporate their religious values in public life, I predict that Catholic justices will write separately at higher rates than non-Catholic justices. Such a finding would be consistent with Ulmer's (1970) evidence of Catholic justices writing dissenting opinions at a higher rate than other justices.

Hypothesis 13: Catholic justices will write separate opinions more often than other justices in issue areas containing a strong nexus between religious values and law.

Data Collection

To examine the role of religion in judging on the U.S. Supreme Court, this paper will utilize the Supreme Court Database (2010) between the 1953 and 2007 terms. The data include all orally argued and formally decided cases that were non-unanimous in the selected issue areas. I exclude unanimous cases because they represent instances when the requirements of the rule of law are clear. In those cases, the justices do not need to rely on their ideology or their religion to suggest an answer to a legal controversy, although they certainly may do so. My claim is not that religion is a universal factor influencing judicial decisionmaking, which would require including unanimous cases. My research question is rather that given a disagreement over what the law requires, to what extent is that disagreement motivated by religious affiliation versus judicial ideology?

Selecting the issue areas of the cases was done using the issue and Issue Area codes in the Supreme Court Database (2010). The Civil Rights issue area is a combination of desegregation, employment discrimination, and affirmative action cases. The Death Penalty issue area includes jurors and death penalty cases and does not include non-death-penalty cruel and unusual punishment cases. The Establishment Clause issue area includes aid to parochial schools cases. The Gender Discrimination issue area is a combination of sex discrimination and sex discrimination in employment cases. The

Immigration issue area is a combination of statutory construction of immigration criminal law, deportation cases, employability of aliens cases, and every category of immigration and naturalization cases. The Poverty Law issue area is a combination of poverty law (both issue codes) cases, every category of indigents' cases, and debtors' rights cases.

The dependent variable for each issue area is Liberal Vote, which is the from the direction variable in Supreme Court Database. Cases in which the ideological direction of the vote is not clearly specified have been excluded. The key independent variable is Catholic, which takes on 0 for non-Catholic justices and 1 for Catholic justices.⁶ This variable is coded in accordance with the religious affiliation data presented in Table 1. Justice Clarence Thomas had been attending an Episcopal Church until 1996, when he rejoined the Catholic Church (Perry 2008, 167). Thus, Justice Thomas is coded as a non-Catholic for cases decided prior to the 1996 term and as a Catholic subsequently. The key control variable is Ideology, which is each justice's annual Judicial Common Space scores taken from Epstein et al. (2007). Thus, for issues like Establishment Clause cases, we would expect the Catholic coefficient to take on a negative sign, while in Civil Rights cases the Catholic coefficient should be positive. I have included additional control variables of whether the lower court issued a liberal opinion and whether the justice in question had prior judicial experience, which are controls used in Boyd, Epstein, and

⁶ I recognize that grouping Jewish justices together with Protestant justices might present a problem. I have conducted a logistic regression for all 11 issue areas substituting Jewish for Catholic as the independent variable. In nine issue areas, there were no statistically significant results for the Jewish variable. Jewish justices appear to be more conservative than non-Jewish justices on Poverty Law cases, which would seem to go against the social justice emphasis of some Jewish theologies (e.g., Vorspan and Saperstein 1998). Jewish justices also vote more liberally than non-Jewish justices in Gender Discrimination cases, but the only Jewish justice who has cast votes in these cases is Justice Ginsburg. Thus, these results may have more to do with gender than religion. I also ran the matching analysis with Jewish as the treatment variable, which failed to yield significant results in eight of 11 issue areas. Jewish justices appear to be more liberal in criminal rights, abortion, and obscenity cases.

Martin’s (2010) study of gender effects in judging. Epstein, Knight, and Martin (2003) find that 70 percent of all political science studies on background characteristics find an effect between prior judicial experience and vote choice. In addition, the Supreme Court tends to choose cases in which they will reverse lower court decisions, thus I expect that if the lower court issued a liberal opinion, the Supreme Court would be poised to issue a conservative opinion.

Because of the dichotomous nature of the dependent variable, the effect of religion on judging will first be measured using logistic regression. As Boyd, Epstein, and Martin (2010, 305) have noted, data on gender and judging “are so imbalanced that regression analysis could produce profoundly misleading results” because female judges tend to be more liberal than their male colleagues. Religion might be different than gender, as there is a more even distribution of judicial ideologies for Catholic and non-Catholic justices. Nonetheless, I will use semiparametric matching to verify the results of regression and control for justice-specific fixed effects. Using the MatchIt software package developed by Ho et al. (2006), this methodology will estimate a propensity score by calculating a logistic regression of the treatment indicator on the covariates.⁷ For each justice-vote, observations will be matched with others with similar propensity scores using the “nearest-neighbor” method without replacement.⁸ In other words, for each Catholic justice-vote, MatchIt will pair it with a non-Catholic justice vote with a similar Ideology score. This creates a treatment effect that will indicate how much more likely a

⁷ I also performed semiparametric matching using the GenMatch package (Sekhon 2007) and did not find much substantive difference with the results from MatchIt.

⁸ Nearest neighbor matching can also be applied with replacement, and there is some debate over which matching method is best (Ho et al. 2007). For this analysis, nearest neighbor matching without replacement generated the largest number of successfully paired matches for more robust findings.

Catholic justice is to vote in the predicted direction than a non-Catholic justice. Unfortunately, due to a small n in some issue areas or a lack of consistent variation among independent variables, the matching analysis can only be performed on the religion and ideological variables. The other two controls variables are excluded.

Finally, to test Hypothesis 13, I used the Supreme Court Database to calculate the rate at which Catholic and non-Catholic justices wrote concurring and dissenting opinions in non-unanimous cases, while excluding cases in which the justice in question wrote the majority opinion. I then performed a simple difference of proportions test.

Chapter Four: Empirical Results and Discussion

The results of the logistic regression are reported in Table 2. Across a wide range of legal issues, it appears that the Catholic variable plays a role in judicial decisionmaking independent of Ideology. These significant results include votes predicted in the conservative direction and voted predicted in the liberal direction. The value of the Catholic variable took on a coefficient in the predicted direction eight times in the regression and nine times in the matching analyses. In every issue area, Ideology significantly influences a justice's voting behavior in the predicted direction. On most issue areas, the behavior of the lower court and the career background of each justice play a significant role in explaining vote choice as well.

The results of the semiparametric matching are reported in Table 3. In seven issue areas, Catholic justices are significantly more likely to vote in ways consistent with Church teachings according to the matching analysis ($p < .10$, one-tailed test). These data largely mirror the results of the logistic regression analysis, and they provide evidence that the significance of the regression results is not a product of justice-specific fixed effects. The n for these results are much smaller than the n of the regression results because data that cannot be matched successfully are removed from the dataset. The results for writing separate opinions are reported in Table 4.⁹ The results of all three analyses are discussed by hypothesis below.

⁹ It is possible that Catholic justices, for whatever reason, are simply more inclined to write separate opinions on all legal issues, not just ones that speak to religious values. I calculated the rate at which Catholic and non-Catholic justices write separate opinions in all non-unanimous cases. While Catholic justices do write separate opinions at a slightly higher rate, the difference in proportions does not achieve conventional levels of significance.

The data from both analyses support the hypothesis that Catholic justices will vote more conservatively in abortion (Hypothesis 1). According to the matching analysis, Catholic justices are, on average, 14.9 percent more likely to issue a conservative vote. Both of these findings are highly significant. Surprisingly, Catholic justices write separate opinions in these cases at a lower rate than non-Catholic justices, although these results do not achieve conventional levels of significance. Overall, these results reflect the high-profile nature of abortion in modern Catholic politics.

The results on Hypothesis 2 are fairly strong. The logistic regression results yields a religion effect in the predicted direction, and the religion effect achieves significance in the matching analysis. Catholic justices, however, write separate opinions at a lower rate in these cases, though these results are not significant. In terms of Gender Discrimination cases (Hypothesis 3), the Catholic coefficient in the regression is in the opposite direction than predicted, although in the matching analysis the mean treatment effect is in the predicted direction. Catholic justices write separate opinions at a higher rate in these cases than non-Catholic justices, but this difference is just shy of statistical significance.

For all Criminal Rights cases (Hypothesis 4), Catholic justices vote significantly more liberally than non-Catholic justices according to both the regression and matching analyses. The average treatment effect is only 3.4 percent, which is the smallest of any statistically significant finding for religion in the matching analysis. Catholic justices are also significantly more likely than non-Catholic justices to write separate opinions in Criminal Rights cases. When looking at Death Penalty cases (Hypothesis 5), the Catholic variable takes on a coefficient in the opposite direction as predicted in both the regression

and matching analyses. Neither of these results is statistically significant, although Catholic justices are significantly more likely to write separate opinions on Death Penalty cases compared to non-Catholic justices.

These results are driven in large part by Justices Scalia and Thomas, who have never cast a liberal vote in a non-unanimous death penalty case. These results do not mean, however, that Catholic justices are unconcerned about their religious values and the death penalty. Justice Scalia (2002, 17) wrote an op-ed in the conservative Christian magazine *First Things*, in which he argued that the Catholic Church's stance against the death penalty should be interpreted as allowing the death penalty because of a separation of private morality and public morality. He argues that the role of the judge is not to rewrite public laws based on his personal moral beliefs. Furthermore, he gives a broad interpretation to the *Evangelium Vitae*, which allows for capital punishment only "when it would not be possible otherwise to defend society." Justice Scalia argues that the redress of social disorder caused by crime provides this basis. By interpreting Catholic doctrine in this way, Scalia can square his conscience with his votes.

Catholic justices are significantly more likely than non-Catholic justices to vote in the conservative direction on Establishment Clause cases according to the regression (Hypothesis 6). The matching analysis confirms this finding and it also indicates that Catholic justices are significantly more likely to embrace the liberal position in Free Exercise cases. The average treatment effect of Free Exercise (Hypothesis 7) cases is 20.4 percent, which is the strongest among all issue areas with statistically significant

religion effects. On both issue areas, Catholic justices are more likely to write separate opinions, but these results are not statistically significant.

The strength of the treatment effect on Free Exercise cases is somewhat surprising in light of *Employment Division v. Smith* (1990), which greatly restricted the reach of the Free Exercise Clause by holding that neutral laws of general applicability may infringe upon religious practices. Justice Scalia wrote the majority opinion in that case, and he was joined by Justices Thomas and Kennedy. Perhaps these justices conceive of a Free Exercise Clause that should only protect religious activity that Christians are likely to engage in, which would not include smoking peyote. On the other hand, the Catholic justices voted to strike the anti-Santeria law in *Church of Lukumi Babalu Aye v. City of Hialeah* (1993). It is also worth noting that religious activity cases after *Smith* were litigated as free speech cases (*Lamb's Chapel v. Center Moriches School District* 1993; *Rosenberger v. University of Virginia* 1995), and those claims received a great deal of support from these three justices (Hacker 2005).

The data largely do not support Hypothesis 8 – that Catholic justices should be more liberal than other justices in Immigration cases. The results for Hypothesis 9, which predicted that Catholic justices would be more conservative than other justices in their votes on Obscenity cases, are mixed. In the regression, the direction of the Catholic coefficient was in the predicted direction, but the religious effect was not statistically significant. In the matching analysis, the religion effect achieves significance with an average treatment effect of 8.1 percent. Catholic justices are also significantly more likely to write separate opinions in these cases.

The data regarding economic issues are mixed. In Poverty Law (Hypothesis 10) cases, the regression and matching analyses demonstrates a significant religious effect in the predicted direction. The coefficient for the Catholic variable is in the opposite direction than predicted in Union cases (Hypothesis 11), but this finding does not achieve significance. Catholic justices are slightly, but not significantly, more likely to write separate opinions in these cases. Finally, the data support Hypothesis 12; in cases in which religious values do not have a strong nexus to law, Ideology alone drives the justices voting behavior. The results for a religious effect in Federalism cases are not statistically significant.

Chapter 5: Conclusion

The data reported herein largely support the hypothesis that religion is a source of judicial policy preferences, independent of underlying differences in ideology and justice-specific fixed effects. Religion may not be as powerful an influence as ideology, but religion might shape the development of judicial ideology. Further research is needed to examine this potential causal relationship. The religious effects measured in this paper span many different substantive areas of law that could be connected to religious values. Religion is a complex factor that influences justices to vote in the liberal direction on some issues and conservative votes on others. But unlike judicial ideology, the influence of religion on judging is not universal. Religion should only exert an influence on judicial behavior if there is a connection between theology and law.

Judges might not ever consciously take religion into account when making judicial decisions, but religion has a transformative power that can dramatically shape an adherent's worldview. Given that judges often make difficult decisions involving policy considerations and conflicting moral and legal principles, religion is a variable that political scientists should account for in seeking to explain judicial behavior. Judges might take umbrage at the notion that religion plays a role in their jobs, but judges are not automatons who decide cases mechanically. They are human beings, and their experiences and values are bound to shape how they view the world, and, by extension, the law. Chief Justice Roberts' argument (2005) that judges should be like baseball umpires – detached and inflexible – is a myopic view of judging (and umpiring) (Blake 2010).

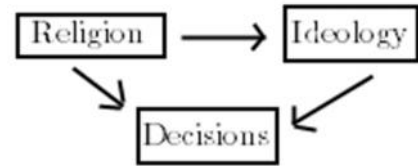
Whether it ought to or not, religion plays a role in judging, and this role varies based on differences in theology or in each denomination's emphasis on faith in public life. It is impossible to state definitively which of those two factors (or a combination thereof) is driving these results, especially without observing the justice's religious activities. It may well be that most of the justices encounter the same sort of religious values on a given issue area, but they might still differ on the extent to which those values influence them – either consciously or subconsciously. I recognize that operationalizing my key independent variable as Catholic versus non-Catholic fails to capture much of the nuance in religious values for which a more precise definition of religion might account. Yet despite this crude proxy and despite a wide variance in judicial ideology among Catholic justices, the evidence indicates a religion effect in many area of Supreme Court decisionmaking.

Recognizing this religious effect on judging does not mean that presidents should choose judicial nominees using religious litmus tests. This paper is not intended to encourage a greater (or smaller) role for faith in public life. Its goal is simply to call attention to this potentially important influence on justices who must decide some of the most nettlesome social controversies facing the American polity.

Tables and Figures

Table 1: Religious Affiliations of Supreme Court Justices	
Justice	Religious Affiliation
Black	Baptist
Reed	Methodist
Douglas	Presbyterian
Frankfurter	Jewish
Jackson	Episcopalian
Burton	Unitarian
Clark	Presbyterian
Minton ¹⁰	Protestant
Warren	Methodist
Harlan	Presbyterian
Brennan	Catholic
Whittaker	Methodist
Stewart	Episcopalian
White	Episcopalian
Goldberg	Jewish
Fortas	Jewish
Marshall	Episcopalian
Burger	Presbyterian
Blackmun	Methodist
Powell	Presbyterian
Rehnquist	Lutheran
Stevens	Protestant
O'Connor	Episcopalian
Scalia	Catholic
Kennedy	Catholic
Souter	Episcopalian
Thomas	Episcopalian/Catholic ¹¹
Ginsburg	Jewish
Breyer	Jewish
Roberts	Catholic
Alito	Catholic
Sotomayor	Catholic
Kagan	Jewish

Figure 1



¹⁰ Justice Minton converted to Catholicism after his retirement from the Court (Gugin and St. Clair 1997, 304).

¹¹ Justice Thomas rejoined the Catholic church in 1997 (Perry 2008, 167).

Table 2: Logistic Regression of Religious Effect on Judging						
Issue Area	Variable		S.E.	<i>p</i>	Pseudo-R ²	<i>n</i>
Abortion/Right to Die	Catholic	-1.265	0.472	***	0.386	275
	Ideology	-4.147	0.542	‡		
	Lower Court Liberal	0.383	0.374			
	Judicial Experience	1.047	0.387	***		
Civil Rights	Catholic	0.300	0.247		0.374	1035
	Ideology	-4.699	0.286	‡		
	Lower Court Liberal	-0.376	0.167	*		
	Judicial Experience	0.073	0.189			
Criminal Rights	Catholic	0.188	0.079	**	0.319	8,738
	Ideology	-3.919	0.081	‡		
	Lower Court Liberal	-0.728	0.058	‡		
	Judicial Experience	0.315	0.062	‡		
Death Penalty	Catholic	-0.418	0.340		0.492	649
	Ideology	-5.651	0.449	‡		
	Lower Court Liberal	-1.076	0.301	‡		
	Judicial Experience	0.541	0.293	*		
Establishment	Catholic	-1.220	0.388	***	0.394	419
	Ideology	-4.420	0.429	‡		
	Lower Court Liberal	1.304	0.290	‡		
	Judicial Experience	0.805	0.300	***		
Free Exercise	Catholic	0.419	0.600		0.314	150
	Ideology	-2.270	0.563	‡		
	Lower Court Liberal	-2.092	0.469	‡		
	Judicial Experience	1.206	0.493	**		
Gender Discrimination	Catholic	-0.330	0.439		0.395	409
	Ideology	-5.041	0.504	‡		
	Lower Court Liberal	-0.813	0.278	***		
	Judicial Experience	-0.179	0.306			
Immigration	Catholic	0.038	0.286		0.288	768
	Ideology	-3.921	0.278	‡		
	Lower Court Liberal	0.257	0.182			
	Judicial Experience	0.294	0.197			
Obscenity	Catholic	-0.097	0.423		0.407	447
	Ideology	-4.762	0.428	‡		
	Lower Court Liberal	-1.123	0.303	‡		
	Judicial Experience	1.164	0.308	‡		
Poverty Law	Catholic	0.575	0.316	*	0.369	704
	Ideology	-4.200	0.314	‡		
	Lower Court Liberal	-1.079	0.208	‡		
	Judicial Experience	0.530	0.223	**		
Unions	Catholic	-0.367	0.270		0.164	727
	Ideology	-2.672	0.243	‡		
	Lower Court Liberal	-0.219	0.168			
	Judicial Experience	-0.124	0.181			
Federalism	Catholic	0.032	0.155		0.056	1,420
	Ideology	-1.311	0.139	‡		
	Lower Court Liberal	-0.380	0.116	***		
	Judicial Experience	0.073	0.125			

* $p < .10$, **
 $p < .05$, ***
 $p < .01$, ‡ p
 $< .001$

Table 3: Average Treatment Effect of Religion on Liberal Votes				
Issue Area	Mean	S.E.	<i>p</i>	<i>n</i>
Abortion	-0.171	0.051	***	59
Civil Rights	0.045	0.023	*	210
Criminal Rights	0.034	0.005	‡	1,800
Death Penalty	-0.027	0.019		211
Establishment	-0.111	0.037	***	79
Free Exercise	0.204	0.078	**	28
Gender Discrimination	0.012	0.037		75
Immigration	0.008	0.039		115
Obscenity	-0.081	0.035	*	106
Poverty Law	0.051	0.022	**	219
Unions	-0.022	0.039		103
Federalism	-0.002	0.028		278

* $p < .10$, ** $p < .05$, *** $p < .01$, ‡ $p < .001$

Table 4: Difference of Proportions for Writing Separate Opinions by Religion					
Issue Area	Catholic	<i>n</i>	Non-Catholic	<i>n</i>	<i>p</i>
Abortion	0.400	45	0.436	188	
Civil Rights	0.333	159	0.343	761	
Criminal Rights	0.287	1,539	0.270	6,920	**
Death Penalty	0.386	184	0.322	656	**
Establishment	0.444	63	0.410	295	
Free Exercise	0.429	21	0.333	120	*
Gender Discrimination	0.333	60	0.277	300	*
Immigration	0.275	91	0.226	526	*
Obscenity	0.456	90	0.281	562	‡
Poverty Law	0.181	210	0.242	898	
Unions	0.219	73	0.206	524	
Federalism	0.231	225	0.240	979	

* $p < .10$, ** $p < .05$, *** $p < .01$, ‡ $p < .001$

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